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KAMALANATHAN RATNAM IC

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jurisdiction of the court and for an injunction to restrain the petitioner from taking any further steps in the presentation of the petition, arguing that it was neither insolvent nor unable to pay its debts as alleged by the petitioner and that the petition was brought for a collateral purpose which was to exert improper pressure upon the respondent. The respondent also contended that the purported debt was genuinely disputed and that deprived the petitioner of locus standi to present the petition.

Held, allowing the respondent's application and striking out the winding-up petition with costs:

- (1) A winding-up petition in itself must allege and prove the facts entitling the petitioner to present the said petition (see p 386H-I).
- (2) In order to ascertain its liabilities under s 218(2)(c) of the Act, it was proper that the respondent's assets were also ascertained because only upon ensuring that there were insufficient assets to meet the debts could there be ascertained liabilities. Therefore, the current assets must be taken stock of to see if after considering the total liabilities — both contingent and prospective — there was a surplus deficit (see p 390A-B); *Re Great Eastern Hotel (Pte) Ltd* [1989] 1 MLJ 161 and *Re Capital Annuities Ltd* [1979] 1 WLR 170 followed; *Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1992] 1 MLJ 313, *Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd* [1980] 2 MLJ 53 and *Re Sanpete Builders (S) Pte Ltd* [1989] 1 MLJ 393 distinguished.
- (3) So long as sufficient evidence had been tendered to enable the court to decide, the question of the inability of a company to pay its debts need not be left to be decided only upon the hearing of a petition to wind up. The court could decide this issue during the application to strike out the petition provided sufficient, cogent, undisputed evidence was before the court to enable it to apply 'the overall assets and liabilities test' as opposed to 'the quick assets test' (see p 394F-G).
- (4) Although the net current liabilities of the respondent's group of companies exceeded current assets in the sum of RM758,758,000, this net current liability position must be scrutinized. The current liabilities was largely made up of deposits in the respondent's finance company subsidiary which was Kewangan Bersatu Bhd ('KUBB'). Pursuant to accounting principles, the said deposits were treated as a 'current liability' as it represented a debt which was payable in the event that depositors wished to withdraw their deposits at any time. However, unless there was a run on KUBB, it was highly unlikely that depositors would be rushing to KUBB to withdraw their funds all at the same time. If the said deposits were to be removed from 'current liability', the position of the group would show a surplus in the current asset position of RM733,017,000 (see p 391G-I).

- A (5) In the present case, no statutory demand had been made under s 218(2)(a) of the Act and the court was satisfied that there was sufficient evidence to show that the debt was in dispute. The court should restrain a winding-up petition where the debt was disputed by a respondent company on some substantial ground (see pp 399A and 397H-I); *Mann & Anor v Goldstein & Anor* [1968] 2 All ER 769 followed; *Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95 and *Chip Yew Brick Works Sdn Bhd v Chang Heer Enterprise Sdn Bhd* [1988] 2 MLJ 447 distinguished.
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- C (6) Section 218(2) of the Act only provided the methods by which a petitioning creditor might prove the ground as stated in 218(1)(e). The presumption under s 218(2)(c) only arose after adjudication by the court and after the facts giving rise to the presumption were proved regardless of the means employed by a petitioner to prove the ground based on s 218(1)(e) (see pp 399I and 400A-C).
- D (7) The court was empowered to strike out a petition which relied on s 218(1)(e) read with s 218(2)(a) of the Act where it could be shown at the interlocutory stage that the petition was bound to fail or was an abuse of the process of the court as the court could hold that there was no necessity for a trial to determine whether the presumption under s 218(2)(a) could be invoked. Clearly, any petition grounded on s 218(1)(e) which was sought to be proved under s 218(2)(a) or (b) or (c) and which was based on a debt which was in dispute, or which was bound to fail or was otherwise an abuse of the process could be struck out at the interlocutory stage (see p 400C-D).
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[Bahasa Malaysia summary]

- G Pempetisyen adalah pada semua masa material pemilik berdaftar kesemua syer yang dikeluarkan dan dibayar di dalam beberapa buah syarikat termasuk sebuah syarikat bernama Sagisan Sdn Bhd yang memegang lesen konsesi pembalakan yang membolehkan mereka untuk membalak di dalam kawasan ditentukan di dalam negeri Sabah. Melalui satu perjanjian jual beli syer bertarikh 9 September 1991 ('perjanjian 1991'), pempetisyen telah menjual kesemua syer kepada penentang pada harga RM60 juta. Perjanjian 1991 kemudiannya telah diubah dan tarikh penyempurnaan telah dilanjutkan kepada 10 Jun 1992. Pempetisyen mengatakan bahawa mengikut perjanjian itu sejak bulan September 1991 penentang telah mengambil kawalan dan milikan syarikat-syarikat itu dengan mengecualikan pempetisyen dan bahawa penentang juga telah mengeluarkan dan menjual hasil pembalakan. Pempetisyen juga mengatakan penentang tidak menyempurnakan penjualan itu pada tarikh yang dijanjikan walaupun ia telah terus menerima manfaat daripada aset dan lesen konsesi syarikat-syarikat itu. Satu perjanjian muktamad bertarikh 4 September 1993 yang terkandung di dalam sepucuk surat mengenai penyempurnaan perjanjian 1991 telah ditandatangani dan terma-
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terma antaranya ialah baki harga belian iaitu RM20 juta akan dipegangmilik sebagai cagaran menunggu pembaharuan lesen konsesi Sabakina dan jika pembaharuan tidak didapati sebelum 31 Disember 1993, RM20 juta tersebut akan dipotong daripada balasan pembelian dan pempetisyen juga akan memulangkan RM3 juta yang diperuntukkan oleh penentang kepada pempetisyen untuk mendapatkan lesen itu. Satu pertikaian timbul tentang kewajipan pempetisyen berkenaan dengan pembaharuan lesen itu kerana penentang telah mengatakan bahawa pempetisyen telah gagal menyerah lesen itu kepada wakil penentang dan oleh yang demikian enggan membayar baki harga belian itu. Pempetisyen, dengan mengemukakan petisyen penggulungan di bawah s 218(1)(e) Akta Syarikat 1965 ('Akta tersebut') dibaca bersama dengan s 218(2)(c) Akta tersebut, mengatakan antara lainnya, bahawa penentang adalah tidak solven dan tidak berupaya membayar hutang-hutangnya memakai ujian 'quick assets' yang berdasarkan kepada akaun-akaun tahunan untuk tahun-tahun berakhir pada 1993 dan 1994 di mana liabiliti semasanya melebihi aset semasanya, dan oleh itu adalah adil dan saksama menggulungan penentang dalam ertikata s 218(1)(i) Akta tersebut. Penentang memohon untuk membatalkan petisyen itu menurut bidang kuasa sedia ada mahkamah dan untuk satu injunksi untuk menghalang pempetisyen daripada mengambil langkah-langkah selanjutnya untuk mengemukakan petisyen itu dengan mengatakan bahawa ia bukan tidak solven dan bukan tidak berupaya membayar hutang-hutangnya seperti yang dikatakan oleh pempetisyen dan petisyen itu adalah dibawa untuk satu tujuan sampingan iaitu untuk mengenakan tekanan tak wajar terhadap penentang. Penentang juga mengatakan bahawa hutang yang dinyatakan adalah benar-benar dipertikaikan dan itu melucutkan locus standi pempetisyen untuk mengemukakan petisyen.

Diputuskan, membenarkan permohonan penentang dan membatalkan petisyen penggulungan dengan kos:

- (1) Satu petisyen penggulungan harus mengatakan dan membuktikan fakta-fakta yang memberi hak kepada pempetisyen mengemukakan petisyen tersebut (lihat ms 386H-I).
- (2) Untuk menentukan liabiliti di bawah s 218(2)(c) Akta tersebut, adalah berpatutan jika aset penentang juga ditentukan kerana hanya pada pemastian bahawa tidak terdapat aset yang mencukupi bagi memuaskan hutang-hutang itu boleh dikatakan ada liabiliti yang ditentukan. Oleh yang demikian, aset semasa harus diambilkira untuk menentukan sama ada selepas menimbangkan jumlah liabiliti — kedua-dua kontingen dan prospektif — terdapat satu kekurangan (lihat ms 390A-B); *Re Great Eastern Hotel (Pte) Ltd* [1989] 1 MLJ 161 dan *Re Capital Annuities Ltd* [1979] 1 WLR 170 diikuti; *Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1992] 1 MLJ 313, *Malayan Plant (Pte) Ltd v*

- A *Moscow Narodny Bank Ltd* [1980] 2 MLJ 53 dan *Re Sanpete Builders (S) Pte Ltd* [1989] 1 MLJ 393 dibeza.
- (3) Asalkan keterangan yang mencukupi telah dikemukakan untuk membolehkan mahkamah membuat keputusan, soalan ketidakupayaan sesebuah syarikat membayar hutangnya tidak perlu ditinggalkan untuk diputuskan cuma pada pembicaraan satu petisyen penggulangan. Mahkamah boleh memutuskan isu itu semasa permohonan untuk membatalkan petisyen, asalkan keterangan yang mencukupi, kukuh dan tidak dipertikaikan dikemukakan kepada mahkamah untuk membolehkannya memakai 'ujian keseluruhan aset dan liabiliti' dan bukannya ujian 'quick assets' (lihat ms 394F-G).
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- (4) Walaupun liabiliti semasa bersih kumpulan syarikat penentang melebihi aset semasa dengan jumlah RM758,758,000, keadaan liabiliti semasa bersih itu harus diperiksa secara teliti. Sebahagian besar liabiliti semasa itu terdiri daripada simpanan di dalam anak syarikat kewangan penentang iaitu Kewangan Bersatu Bhd ('KUBB'). Menurut prinsip perakaunan, simpanan tersebut dianggap sebagai satu 'liabiliti semasa' kerana ia merupakan satu hutang yang harus dibayar sekiranya para penyimpan ingin mengeluarkan simpanan mereka pada bila-bila masa. Akan tetapi, melainkan terdapat kehilangan keyakinan di KUBB adalah paling tidak berkemungkinan bahawa para penyimpan akan mengejar ke KUBB untuk mengeluarkan simpanan mereka pada masa yang sama. Jika simpanan tersebut dikeluarkan dari 'liabiliti semasa' keadaan kumpulan itu akan menunjukkan satu lebihan dalam aset semasa dengan jumlah RM733,017,000 (lihat ms 391G-I).
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- (5) Di dalam kes, ini tiada tuntutan statutori telah dibuat di bawah s 218(2)(a) Akta tersebut dan mahkamah berpuas hati bahawa terdapat keterangan yang mencukupi bagi menunjukkan bahawa hutang itu dipertikaikan. Mahkamah harus menyekat satu petisyen penggulangan di mana hutang adalah dipertikaikan oleh sebuah syarikat penentang atas alasan yang berasas (lihat ms 399A dan 397H-I); *Mann & Anor v Goldstein & Anor* [1968] 2 All ER 769 diikuti; *Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95 dan *Chip Yew Brick Works Sdn Bhd v Chang Heer Enterprise Sdn Bhd* [1988] 2 MLJ 447 dibeza.
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- (6) Seksyen 218(2) Akta tersebut hanya memperuntukkan cara-cara di mana satu penghutang yang mempetisyen boleh membuktikan dasar yang dinyatakan di dalam s 218(1)(e). Anggapan di bawah s 218(2)(c) hanya timbul selepas penghukuman oleh mahkamah dan selepas fakta-fakta yang menimbulkan anggapan itu dibuktikan tanpa mengira apa cara yang digunakan oleh seseorang mempetisyen untuk membuktikan dasar berdasarkan s 218(1)(e) (lihat ms 399I dan 400A-C).
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- (7) Mahkamah telah diperuntukkan kuasa untuk membatalkan suatu petisyen yang bergantung kepada s 218(1)(e) dibaca bersama dengan s 218(2)(a) Akta tersebut di mana ia dapat ditunjukkan pada peringkat interlokutori bahawa petisyen itu akan gagal atau merupakan satu penyalahgunaan proses mahkamah kerana mahkamah boleh memutuskan satu perbicaraan adalah tidak perlu untuk menentukan sama ada anggapan di bawah s 218(2)(a) boleh diguna pakai. Adalah jelas sebarang petisyen yang bergantung kepada s 218(1)(e) di mana ia ingin dibukti di bawah s 218(2)(a) atau (b) atau (c) dan di mana ia berdasarkan suatu hutang yang dipertikaikan, atau yang tentu akan gagal ataupun merupakan satu penyalahgunaan proses boleh dibatalkan pada peringkat interlokutori (lihat ms 400C–D)].

Notes

For cases on winding up, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 399–570.

Cases referred to

- Capital Annuities Ltd, Re* [1979] 1 WLR 170 (folld)
Chip Yew Brick Works Sdn Bhd v Chang Heer Enterprise Sdn Bhd [1988] 2 MLJ 447 (distd)
Fildes Bros Ltd, Re [1970] 1 All ER 923 (refd)
Great Eastern Hotel (Pte) Ltd, Re [1989] 1 MLJ 161 (folld)
Lundie Brothers Ltd, Re [1965] 2 All ER 692 (refd)
Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd [1980] 2 MLJ 53 (distd)
Mann & Anor v Goldstein & Anor [1968] 2 All ER 769 (folld)
Mark Jaya Engineering Sdn Bhd v LFY Construction Sdn Bhd [1990] 1 MLJ 372 (refd)
Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd [1991] 1 MLJ 95 (distd)
Ng Ah Kway v Tai Kit Enterprise Sdn Bhd [1986] 1 MLJ 58 (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)
Ng Tai Tuan & Anor v Chng Gim Huat Pte Ltd [1991] 1 MLJ 338 (refd)
Perwira Habib Bank Malaysia Bhd v Hj Abdullah bin Hj Sulaiman & Anor [1985] 2 CLJ 489 (refd)
Ringtower Holdings plc, Re [1989] 4 BCC 82 (refd)
Sanpete Builders (S) Pte Ltd, Re [1989] 1 MLJ 393 (distd)
Sri Hartamas Development Sdn Bhd v MBF Finance Bhd [1992] 1 MLJ 313 (distd)
Standard Chartered Bank Malaysia Bhd v Eng Song Huat [1996] 1 MLJ 446 (refd)
Watta Battery Industries Sdn Bhd v Uni-Batt Manufacturing Sdn Bhd [1990] 1 CLJ 578 (refd)
Welsh Brick Industries Ltd, Re [1946] 2 All ER 197 (refd)

Legislation referred to

Companies Act 1965 s 218(1)(a), 218(1)(e), 218(1)(i), 218(2)(a), 218(2)(b), 218(2)(c)

- A Companies (Winding-Up) Rules 1972
Companies Act (Cap 50, 198 Ed) [Sing] s 254(1)(e), 254(2)(c)
Companies Act 1948 [UK] s 223(a), 223(b), 223(c), 223(d)

KS Narayanan, Viji Kumar, Joseph Yeo and Fiona Bodipalar (Sri Ram & Co) for the petitioner.

- B *Loh Siew Cheang, Ranjit Singh and Evelyn Khoo (Cheang & Ariff) for the respondent.*

Cur Adv Vult

- C **Kamalanathan Ratnam JC:** The petitioner claims that a debt of RM30m is due to him from the respondent. The petitioner has not sent a statutory demand under s 218(2)(a) of the Companies Act 1965 ('the Act') nor does he have a judgment, decree or order of the court to be able to proceed under s 218(2)(b). Instead, he is proceeding under s 218(1)(e) read together with s 218(2)(c) in that the respondent is unable to pay its debts taking into account its contingent and prospective liabilities, and that due to this fact, it would be just and equitable to wind up the respondent under s 218(1)(i).

The background to the petition

- E The petitioner was at all material times the registered owner of the entire shares representing the issued and paid-up capital ('the entire shares') in certain companies ('the total companies') including one Sagisan Sdn Bhd ('Sagisan'). Four of the total companies are holders of timber concession licences enabling them to log timber in designated areas within the state of Sabah under the Sabah Forest Enactment 1968 whilst the other companies have assets and expertise connected with the timber trade.

- F By a share sale and purchase agreement dated 9 September 1991 ('the 1991 agreement'), the petitioner sold the entire shares in the total companies to the respondent for a total purchase price of RM60m. The
- G 1991 agreement was subsequently varied on 30 January 1992 by a supplemental agreement ('the supplemental agreement') which extended the completion date of the 1991 agreement to 21 March 1992. By an addendum dated 7 May 1992, the completion date for the sale of the entire shares was extended to 21 May 1992 with a right to the respondent to apply to the petitioner for further extension of time for payment of the balance purchase price till 9 September 1993 subject to the payment of interest. By a letter of extension dated 21 May 1992, the completion date was again extended to 10 June 1992.

- H The petitioner contended that pursuant to the agreements hereinbefore referred to, the respondent had since September 1991 taken control and possession of the total companies to the exclusion of the petitioner and that the respondent has also been extracting and selling the timber products.

I The petitioner also contended that the respondent did not complete the sale on the date agreed earlier though it continued to enjoy the benefits accruing from the assets and concession licences of the total companies. A final agreement contained in a letter with regard to the completion of the

1991 agreement dated 4 September 1993 ('the completion agreement') was signed and the terms, inter alia, were that:

- (a) The respondent would pay a consultancy fee of RM10m to the petitioner on 8 September 1993.
- (b) The respondent would make available RM3m to the petitioner to enable the latter to obtain the renewal of the Sabakina concession licence.
- (c) The balance of the purchase price of RM20m will be retained as security pending the renewal of the Sabakina concession licence and if the renewal was not obtained before 31 December 1993, the said RM20,000,000 was to be deducted from the purchase consideration and the petitioner was also to refund the RM3m.

On 4 September 1993, one Dato' Hj Ishak bin Ismail ('Ishak') who at all material times had been negotiating with the petitioner on behalf of the respondent as its group managing director, issued his personal cheque for RM10m ('the Ishak cheque'). The said cheque was dated 8 September 1993 and was made payable to a third party as the petitioner intended to pay the third party with the sum due from the respondent. The receipt of the Ishak cheque was acknowledged by the petitioner in the completion agreement. The further sum of RM3m was paid to the petitioner on 8 September 1993. As there was a mistake in the name of the drawee in the Ishak cheque, the petitioner met up with Ishak to get the name altered. On 8 September 1993, the petitioner gave the Ishak cheque to the third party.

On 15 September 1993, the petitioner got to know that Ishak had written a letter to the third party contending that the sum paid via the Ishak cheque was not that of the petitioner's, but was Ishak's own payment to the drawee. The petitioner thus requested the respondent or Ishak to issue a fresh cheque payable to him as the drawee so that he could bank the cheque into his own account and then reissue his own cheque to the third party. However, both the respondent and Ishak refused to do so contending that the respondent's obligations under the completion agreement had been satisfied by the issuance of the Ishak cheque, the receipt of which the petitioner had acknowledged.

The petitioner also claims the balance of the purchase price of RM20m due to him pursuant to the completion agreement as he submits that he had already fulfilled his obligation of renewing the Sabakina concession licence for the respondent. The petitioner was granted a power of attorney dated 13 September 1993 by the respondent which was expressed to be valid up to and including 31 December 1993, to enable the petitioner to apply for and obtain a renewal of the Sabakina concession licence. On 13 November 1993, the petitioner obtained a letter of approval for the renewal and informed the respondent of the same vide his solicitor's letter dated 27 November 1993 and requested for the settlement of the RM20m. In response, the respondent demanded that the petitioner procure the issuance and the delivery of the licence for the Sabakina concession to the respondent on or before 31 December 1993. There then followed a dispute as to what the obligations of the petitioner under the completion

- A agreement were and the petitioner replied that such was not a requirement of the completion agreement. Later, the petitioner requested the respondent to furnish him with the requisite documents to enable him to do the needful. The petitioner states that he received the documents on 29 December 1993 and on the same day he submitted them for processing.
- B However, on 3 January 1994 the respondent demanded from the petitioner the return of the original licence for the Sabakina concessions and all other relevant documents, and it was thus the contention of the petitioner that he was therefore prevented from pursuing with the issuance of the new licence. However, as he had done his part, he contends that the balance RM20m is a debt due to him.

C *The petitioner's basis in presenting the winding-up petition*

The petitioner contended that he had made repeated demands for the payment of RM30m debt but the respondent had refused to pay. The grounds of his petition are that:

- D (1) The respondent is insolvent and unable to pay its debts by applying the 'quick assets test' based on its annual accounts for the years ending 1993 and 1994 where its current liabilities exceeded its current assets.
- E (2) The respondent had admitted and confirmed that the alleged debt was due and owing to the petitioner as it was entered in the petitioner's accounts as 'balance payable to vendors of the Sagisan concession'.
- (3) The shares in Sabakina Sdn Bhd (the company which was the initial licensed concessionaire of the Sabakina timber concession) had been transferred to the respondent, and the respondent had since September 1991 extracted and sold timber from all the concessions including the Sabakina concession.
- F (4) It is just and equitable in the circumstances that the respondent should be wound up.

- G In short, the petitioner contended that the respondent was unable to pay its debts within the meaning of s 218(1)(e) of the Act read together with s 218(2)(c) of the Act or that it is just and equitable to wind up the respondent within the meaning of s 218(1)(i) of the Act.

The respondent's application (encl 8) to strike out the petition

- H The respondent applied to strike out the petition pursuant to the inherent jurisdiction of the court and for an injunction to restrain the petitioner whether by himself or his servants, agents or anyone of them, whomsoever, in any manner howsoever, from proceeding with or prosecuting or taking any further steps in the presentation of the petition on the following grounds:

- I (1) the petition is an abuse of the process of this court; and
- (2) the alleged debt upon which the petition was presented is a disputed debt.

By consent, it was agreed that I hear encl 8 first.

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It was submitted that the respondent is a public listed company and that its principal activity is that of an investment holding company. Amongst the many subsidiaries of the respondent is a licensed finance company (Kewangan Bersatu Bhd) and a general insurance company (Talasco Insurance Bhd) dealing with both life and general insurance.

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The respondent's case is that the petition is an abuse of process and should be struck out *in limine* based on the following grounds:

- (1) It is not insolvent nor is it unable to pay its debts as alleged by the petitioner.
- (2) The petition was brought for a collateral purpose which was to exert improper pressure upon the respondent as a winding-up petition would evoke serious consequences in that it would paralyse trade, dispositions and dealings in the shares of the respondent.
- (3) The purported debt is genuinely disputed and by virtue of case law such disputes ought not to be tried by a winding-up court but the civil court.
- (4) A genuine dispute deprives the petitioner of locus standi, that is the petitioner ceases to be a creditor within the meaning of s 217 of the Act and is thus not entitled to present this petition.
- (5) There is no just and equitable ground in the circumstances of this case for the court to order a winding up within the meaning of s 218(1)(i) of the Act.

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It is the respondent's submission that in order for the petitioner to succeed under s 218(1)(e) and 218(1)(i) of the Act, the petitioner must show that the alleged debt of RM30m is undisputedly due and owing and that the accounts allegedly show that the respondent is unable to pay its debts in that its current liabilities exceed its current assets. In other words, the petitioner must succeed on both facets. A failure to succeed on either or both grounds should result in the dismissal of the petition.

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It was submitted by the petitioner that for the purpose of encl 8, he need only show that the facts stated in the petition can found a petition to wind up a company. He does not have to adduce evidence to prove those facts at an interlocutory stage.

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I am of the view that this is not a correct proposition of the law. A winding-up petition in itself must allege and prove the facts entitling the petitioner to present the said petition. Volume 7(2) *Halsbury's Laws of England* (4th Ed), para 1458 states:

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In his petition, a petitioner must allege and prove the facts entitling him to present it, showing that one or more of the grounds specified in the Insolvency Act 1986 or in any other enactment for making a compulsory order exist. Unless these allegations are contained in the petition, it is misconceived, and the court will dismiss it

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A *The accounts of the company*

There are three ways by which the petitioner could prove that the respondent is unable to pay its debts, ie by way of s 218(2)(a), (b) and (c) of the Act. Mr Narayanan lead counsel for the petitioner confirmed that the petition is based on s 218(2)(c) since no statutory notice was served on the

B respondent nor has a judgment been entered against the respondent.

Section 218(2)(c) reads:

(2) A company shall be deemed to be unable to pay its debts if —

...

C (c) it is proved to the satisfaction of the Court that the company is unable to pay its debts; and in determining whether a company is unable to pay its debts the Court shall take into account the contingent and prospective liabilities of the company.

It would seem clear that to fall within s 218(2)(c) of the Act, the petitioner has to prove to the satisfaction of this court that the respondent is unable to pay its debts.

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In the present case, in order to satisfy the court of the respondent's inability to pay its debts, the petitioner relied on the respondent's accounts and submitted that the balance sheets for the years ending 31 December 1993 and 31 December 1994 showed that there is a deficiency of current liabilities as compared to current assets amounting to RM46,796,000 for the year ending 31 December 1993 and RM56,589,000 for the year ending 31 December 1994. By reason of the 'quick assets test', the petitioner contends that the respondent is insolvent.

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Mr Narayanan refers to the annual report and statement of accounts to show that the current liabilities of the respondent exceeded its current assets by a sum of RM758,758,000 which sum is stated to be the net current liabilities of the respondent. Prima facie, he submits that the respondent is commercially insolvent and is unable to meet its admitted debt to the petitioner of RM30m.

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G *The 'quick assets test' or the 'overall assets and liabilities test'*

Is the 'quick assets test' a proper test to ascertain a company's solvency or insolvency more so in the case of a public listed company, or is it proper for the court to consider the proper test as being one which looks at all the assets of a company as against all its liabilities which I will call the 'overall assets and liabilities test'.

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In *Re Capital Annuities Ltd* [1979] 1 WLR 170, a winding-up petition was presented by the company itself under s 50 of the Insurance Companies Act 1974 on the ground of it being 'unable to pay its debts'. The evidence as to the company's financial state was in the form of a statement showing cash assets of £1,326,885 and present liabilities of £1,592,442. Thus, the current financial state showed a deficit of £265,557. It was argued by the petitioning company that the deficit of £265,557 was less than what would

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be required to discharge the company's present liabilities and that there was a further liability to policy holders of £600,000. Thus, it was submitted by the petitioning company that for the time being, there was insufficient liquid assets to pay all its presently owing debts and therefore it was 'unable to pay its debts'. Slade J rejected this argument as mere evidence of a current deficit which did not prove that the company was unable to pay its debts. He further held at p 187:

As I have already indicated, I do not think it has yet been proved that the present contingent and prospective liabilities of the company exceed the present value of its assets; accordingly, no inability to pay its debts in this sense has been proved.

In *Re Great Eastern Hotel (Pte) Ltd* [1989] 1 MLJ 161, a winding-up petition was brought against the company by one of its members on the ground, inter alia, that the company was unable to pay its debts within the meaning of s 254(1)(e) of the Singapore Companies Act (the equivalent of the Malaysian s 218(1)(e)).

There being no statutory demand, the petitioner relied on s 254(2)(c) (the equivalent to the Malaysian s 218(2)(c)). The petitioner therefore had to positively prove insolvency. In support of the petition, the financial status of the company was put before the court. As at 31 December 1987, there was a current asset deficiency of \$7,688,751.

However, the company had an asset, that is a hotel, valued at approximately \$21m.

Counsel for the petitioner submitted that the fact that the company's assets exceeded its liabilities did not mean that the company was solvent. He contended that the test was that there should not be a deficiency on current assets. He also submitted in order to be solvent, the company must be able to pay its debts out of its own money and could not borrow money to do so.

Grimberg JC rejected counsel's argument and held that the test for solvency is not whether there is a deficiency of current assets over current liabilities ('quick assets test'). He also rejected the argument that a company could only be solvent if it was able to pay debts out of its own money.

In fact Grimberg JC held at p 172:

... Indeed, it was demonstrated to me by Mr Lyndon-Stanford that, were the quick assets test to be the test for solvency, some 20 companies listed in the Stock Exchange of Singapore would be insolvent on the basis of their last published accounts, because each has a deficiency on current assets.

In fact, in the present case, it was also demonstrated to me by Mr Loh, lead counsel for the respondent, that about 15 public listed companies in Malaysia would be in a similar situation. Mr Narayanan submitted that the tendering of the list of Malaysian public listed companies whose current liabilities exceeded their current assets in their balance sheets which demonstrated that these had failed the quick assets test, by Mr Loh, was in effect adducing evidence from the Bar and he asked that such evidence be excluded. Even if I were to accept the same, Mr Narayanan argues that they were merely the balance sheets without the rest of the accounts of the companies concerned and were therefore not a proper basis for comparison.

A No doubt, Mr Loh must have been motivated by the *Re Great Eastern* case to produce the list. I agree that in normal circumstances it would be wrong and indeed improper for counsel to supplement the lack of evidence by his own views or opinions or statements from the Bar which views, opinions or statements might be tantamount to padding up the evidence on behalf of his client. In fact, I had in *Standard Chartered Bank Malaysia Bhd v Eng Song Huat* [1996] 1 MLJ 446 accepted and adopted the view expressed by Gopal Sri Ram JCA in *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 at p 615 wherein his Lordship said:

The practice of counsel giving evidence from the Bar as was done in this case is to be deprecated.

C However, in this case, what Mr Loh did was to tender a list of public listed companies with their current assets and current liabilities indicating clearly that they would all fail the quick assets test as advocated by the petitioner. These balance sheets are all available to the public and I see no reason for rejecting them. Indeed, if these balance sheets were incorrect, Mr Narayanan could have asked for time to enable him to write in to the relevant companies to seek clarification. I do not consider such documentary evidence as evidence from the Bar.

E As to the contention that what was tendered were merely balance sheets without the rest of the accounts, I hold that the same was sufficient for purposes of ascertaining the deficiency of current assets over current liabilities in the quick assets test. The *Company Directors' Manual — The Australian Institute of Company Directors* at p 435 describes the balance sheet as follows:

3.0 THE BALANCE SHEET

F 3.1 Understanding the balance sheet holds the key to understanding the basic of accounting. For the balance sheet shows, in summary form, the overall framework within which the accountant operates.

3.2 ... there are three general categories of items shown on a balance sheet:

- G (a) Assets;
 (b) Liabilities; and
 (c) Shareholders' equity.

... Thus, in an example balance sheet:

	Total Assets - Total Liabilities (= Net Assets) =	Total Shareholders' Equity
H	\$8,753,000 - \$3,365,000 (= \$5,388,000) =	\$5,388,000

In the circumstances, I hold that the approach taken by Mr Loh was correct and I reject the objection taken by Mr Narayanan.

I The management and conduct of a company is with its Board of Directors. On their broad shoulders rest the heavy responsibility of showing profits and to a shareholder this is reflected in the net rise in the value of the share in the company he holds and the resultant dividends that follow. Consequently, the Board ought to be given a free hand within the provisions of the Act to run its business as it deems fit. So long as it does not owe any

one creditor an acknowledged debt that it is unable to pay, it ought to be given the opportunity to conduct its affairs freely. Section 218(2)(c) is very clear. To ascertain if a company is unable to pay its debt, the court shall take into account the contingent and prospective liabilities of the company. In order to ascertain its liabilities, it is proper that its assets are also ascertained because only upon ensuring that there is insufficient assets to meet the debts can there be ascertained liabilities. Therefore the current assets must be taken stock of to see if after considering the total liabilities both contingent and prospective there is a surplus deficit.

The terms 'current assets', 'current liabilities' and 'shareholders' equity' have been defined in the *Company Directors' Manual — The Australian Institute of Company Directors* as follows at p 455:

Current assets:

Cash or other assets expected to be used up or converted into cash within 12 months.

Current liabilities:

Liabilities due and payable within 12 months.

Shareholders' equity:

The proprietorship section of a balance sheet, consisting of the share capital, reserves and retained profits. Represents the interest (equity) of the shareholders in the assets of the company.

This 12-month decisive period is also accepted in accounting practices in Malaysia (see *A Brief Guide To General Accepted Accounting Practices in Malaysia (GAPP)* by Ernst & Young at pp 39–41). According to this guide, a balance sheet has three general categories of item, namely:

- (a) Assets.
- (b) Liabilities.
- (c) Shareholders' equity/funds.

The ultimate result of a balance sheet is represented as follows:

$$\text{Total Assets} - \text{Total Liabilities} (= \text{Net Assets}) = \text{Total Shareholders' Equity/Fund}$$

I reproduce herewith the balance sheet of the respondent as at 31 December 1994:

	NOTE	1994 RM'000	1993 RM'000
CURRENT ASSETS			
Cash and bank balances		14	8
Deposits with financial institutions	3	43	6,230
Other debtors	5	9,319	5,922
Other investments	12	—	69,480
		9,376	81,640

A	CURRENT LIABILITIES			
	Short term borrowings	9	13,833	59,774
	Other creditors	10	52,132	68,662
			<u>65,965</u>	<u>128,436</u>
B	NET CURRENT LIABILITIES		(56,589)	(46,796)
	INTEREST IN SUBSIDIARIES	14	394,932	390,993
	FIXED ASSETS	16	2,747	2,478
	TERM LOANS	19	(11,059)	(20,718)
	LONG TERM LIABILITIES	20	(367)	(423)
C			<u>329,664</u>	<u>325,534</u>
	SHAREHOLDERS' FUNDS			
D	Share capital	21	279,985	279,985
	Share premium		104,155	104,155
	Reserves	22	(54,476)	(58,606)
			<u>329,664</u>	<u>325,534</u>

- E** From the balance sheet of the respondent there is a deficit of current liabilities over current assets of RM56,589,000 in 1994. However, there is a surplus of total assets over total liabilities and this surplus is RM329,664,000 which equals its shareholders' funds. By no stretch of the imagination can the respondent be said to be unable to pay its debts. The respondent being an investment holding company, derives most of its assets from its interest in its subsidiaries. The balance sheet figure shows such interest as amounting to RM394,932,000 in 1994. The consolidated balance sheet of the respondent's group of companies is shown in encl 1 (at p 197). It is to be noted from the consolidated balance sheet that the position of the respondent's group of companies shows that the group also has a surplus of total assets over total liabilities of RM462,168,000. The
- G** net current liabilities of the group, however, exceed current assets in the sum of RM758,758,000 (RM2,190,388,000 – 1,431,630,000). However, this net current liability position must be scrutinized. The figure of RM2,190,338,000 (current liabilities) is largely made up of deposits in the respondent's finance company subsidiary which is Kewangan Bersatu Bhd ('KUBB'). This is represented by 'Deposits from customers to the amount of RM1,491,775,000'. Pursuant to accounting principles, the said deposits are treated as a 'current liability' as it represents a debt which is payable in the event that depositors wish to withdraw their deposits at any time. However, unless there is a run on KUBB, it is highly unlikely that depositors would be rushing to KUBB to withdraw their funds all at the same time.
- I** If the said deposits were to be removed from 'current liability' the position of the group would show a surplus in the current asset position of RM733,017,000 [RM1,431,630,000-(2,190,388,000-1,491,775,000)].

Mr Narayanan relied heavily on *Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1992] 1 MLJ 313 in support of his argument that if the balance sheet showed that current liabilities exceeded current assets, the company was insolvent. He relied on the judgment of Gunn Chit Tuan SCJ at p 320 which states:

In this case, the presumption of insolvency arises when the requirements of s 218(2)(a) of the Act have been satisfied and it is for the company to prove that it is able to pay its debts. In dealing with 'commercial insolvency', that is, of a company being unable to meet current demands upon it, we would respectfully follow the Privy Council in the *Malayan Plant's* case [*Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd* [1980] 2 MLJ 53] and cite the following observations from *Buckley on The Companies Act* (13th Ed) at p 460:

'In such a case it is useless to say that if its assets are realized there will be ample to pay twenty shillings in the pound: this is not the test. A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realizable; but although this be so, yet if it have not assets available to meet its current liabilities it is commercially insolvent and may be wound up.'

Counsel argued that the above passage laid down the proposition that a company is commercially insolvent if it did not have current assets to meet its current liabilities. I am of the view that counsel was incorrect in this respect. *Sri Hartamas* dealt with the petition involving the statutory presumption under s 219(2)(a) of the Act, that is there was non-compliance with the 21-day notice of demand served on the registered office of Sri Hartamas, which was also the case in *Malaysian Plant Pte Ltd v Moscow Narodny Bank Ltd* [1980] 2 MLJ 53. The passage from Buckley cited by Gunn Chit Tuan SCJ continues as follows:

The particular indications of insolvency mentioned in paras (a), (b) and (c) are all instances of commercial insolvency, that is of the company being unable to meet demands upon it. ...

Para (d), however, now recognizes and, in conjunction with s 222(e), expressly authorizes a winding up in the case of another kind of insolvency; that is to say, if the existing and probable assets will be insufficient to meet the liabilities, taking into account not only liabilities presently due but also those which are contingent and prospective.

The words 'paras (a), (b) and (c)' in the first paragraph and the words 'para (d)' in the second paragraph refer to s 223(a), (b), (c) and (d) respectively of the UK Companies Act. Section 223(a) and (b) of the UK Companies Act 1948 find its equivalent in s 218(2)(a) and (b) of the Act. Section 223(d) is *pari materia* to s 218(2)(c) of the Act. There is no equivalent to the UK s 223(c) in Malaysia. In fact, Grimberg JC in the *Great Eastern Hotel* applied the test stated by Buckley, ie the balance sheet test. There are further grounds for rejecting Mr Narayanan's submission on this score. The fact that the statement in Buckley cited in *Sri Hartamas* is confined to a case where a statutory demand was served is further evidenced from the facts of *Sri Hartamas* itself. In fact, learned counsel for the appellant company, Mr Sri Ram (now Gopal Sri Ram JCA) sought to

A rely on the *Great Eastern Hotel* case to argue that the statutory presumption which arose after failure to comply with the statutory demand could be rebutted by evidence that the appellant could pay all its debts by realization of its assets. The asset in question was land worth more than RM500,000,000. Counsel for the respondent, however, distinguished the
B *Great Eastern Hotel* case on the basis that it involved s 254(2)(c) of the Singapore Companies Act (s 218(2)(c) of our Act) whereas *Sri Hartamas* case involved a statutory demand under s 218(2)(a) of the Act. The Supreme Court accepted the respondent's counsel's submission on this point and held that once the presumption of insolvency arose when the requirement of s 218(2)(a) of the Act had been satisfied, the company had
C to prove it was able to pay its debts. In doing so, even if the company had assets locked up and was thus 'wealthy', it was commercially insolvent if after the statutory demand, it was unable to meet current liabilities. In fact, in the *Great Eastern Hotel* case Grimberg JC had occasion to consider the entire passage in Buckley which I reproduced earlier. In respect of the first paragraph of the passage in Buckley, the learned JC held that it related
D to what he referred to as the first test of insolvency which is a failure to pay demands for debts already due. In respect of the second paragraph of the passage in Buckley, the learned JC held that the said paragraph was in respect of the second test of insolvency pursuant to the equivalent of s 218(2)(c) of the Act which is whether there is a deficit of total assets
E against total liability of the company.

Mr Narayanan submits that the *Great Eastern Hotel* case though delivered by the Singapore High Court on 8 January 1988 was not referred to in the case of *Re Sanpete Builders (S) Pte Ltd* [1989] 1 MLJ 393 although the latter was delivered on 5 January 1989. It was submitted before me
F that the learned judicial commissioner's views there were consonant with those expressed by *MacPherson on the Law of Company Liquidation* (3rd Ed) which were that a company is unable to pay its debts if it is shown to be financially insolvent in the sense that its liabilities exceed its assets, irrespective of whether the company is possessed of assets which if released, would enable it to discharge its liabilities to the full.

G Mr Loh points out that both *Re Sanpete* and *Great Eastern Hotel* were reported in the [1989] 1 MLJ issue and hence the *Great Eastern Hotel* case could have been unavailable to be cited in *Re Sanpete*. I find that this must be so. To say that just because a case was not referred to in another judgment implied that the said case had no merits is a submission that in
H itself is devoid of merit. Even if the arguments in *Great Eastern Hotel* was unacceptable to the learned judge in *Re Sanpete*, surely if the same had been cited to him, or if he was aware of it by his own industry and research, he would have as an arbiter of legal principles, considered the said case and stated his reasons as to why he either agreed or disagreed with the views expressed by the learned judge in *Great Eastern Hotel*.

I What has to be distinguished in *Re Sanpete* is that the court found that the accumulated losses of Sanpete were in excess of its capital, ie that Sanpete had even lost its paid up capital. In contrast, in the present case, the respondent has not lost its capital and in fact the respondent has

shareholders' funds in excess of the paid up capital. Further, the assets of Sanpete were only book debts; whereas the respondent in the present case before me had other assets apart from book debts. It must also be noted that the respondent has fixed assets and further assets in the form of investment in subsidiaries.

However, in *Re Sanpete*, like in the present case, the current liabilities exceeded the current assets. The main debtor of Sanpete was insolvent and the liquidators had indicated that any monies payable to unsecured creditors was expected to be negligible. There was the added factor that Sanpete had settlement obligations with another sub-contractor pursuant to a judgment obtained by the same sub-contractor. This was not so in the present case. Finally, there was no indication that fresh capital would be injected into Sanpete or that payment would be received by Sanpete from any source to enable it to discharge its debts to the petitioner. Upon reading the said judgment, I cannot find any averment by the learned judicial commissioner of the law as propounded by Mr Narayanan that just because current liabilities exceeded current assets, the company was insolvent for the purpose of s 254(2)(c) (our 218(2)(c)) of the Act). In fact, it is my view that all the matters referred to above were considered cumulatively and found to contribute towards the conclusion of insolvency of Sanpete. I find firm support for this inference from p 400 of his Lordship's decision in *Re Sanpete*:

Proof that a creditor's debt has not been paid per se does not establish an inability to pay debts within the meaning of s 254(2)(c). The conclusion of insolvency, generally speaking, ought not to be drawn simply from the evidence of a temporary lack of liquidity: *Sandell v Porter (Re Great Britain Mutual Life Assurance Society)* (1880) 16 Ch D 246).

Therefore, I hold that so long as sufficient evidence has been tendered to enable the court to decide, I need not leave the question of the inability of a company to pay its debts to be decided only upon the hearing of the petition to wind up. I can decide this issue during the application to strike out the petition provided sufficient, cogent, undisputed evidence is before me to enable me to apply 'the overall assets and liabilities test' as opposed to 'the quick assets test'.

In the circumstances, I do reject the 'quick assets test' and hold that the proper test to be applied should be the 'overall assets and liabilities test'.

Is there an admission of the debt when the respondent acknowledged the same as due to the petitioner in his statement of accounts?

It is the argument of the petitioner that the respondent has admitted the disputed debt in its accounts by confirming that there were those sums of money due and owing to the petitioner. The so-called debt was acknowledged as item 10 in the statement of account which reads as follows:

10 OTHER CREDITORS

A		Group and Company	
		1993 RM'000	1992 RM'000
	Included in other creditors are:		
B	Balance payable to vendors of the Sagisan Concession	52,000	55,000
	10% deposit received in respect of the disposal of Promet (Langkawi) Resorts Sdn Bhd (PLR) and Mutiara Court Condominiums (MCC)		
C	(Note 32)	7,800	—

The respondent on the other hand argues that the provision in its accounts relating to the respondent's purported debt cannot amount to an admission that the said sums are due and owing to the petitioner for the following reason:

D That the provisions in the accounts were included under 'contingent liabilities' of the respondent for the year ending 31 December 1993 with this qualification:

E The vendors of the Sagisan concession have taken legal action to recover the balance payable to them as stated in Note 10. The company in turn has made counterclaims against the vendors for specific warranties not fulfilled under the agreement entered into. The directors are of the opinion that the likelihood of the above claim crystallizing is remote and furthermore it is imprudent to recognize any gain arising from the counter claim at this juncture.

F The same qualification was made in respect of the 1994 accounts.

A Brief Guide to Generally Accepted Accounting Practices in Malaysia (GAAP) by Ernst & Young defines 'contingency' as follows at p 35:

G A *contingency* is a condition or situation existing at balance sheet date, the ultimate outcome of which will be confirmed only on the occurrence, or non-occurrence, of one or more uncertain events. The resulting gain or loss, if any, is referred to as a contingent gain or loss. Examples of such conditions include:

- Pending or threatened litigation, claims or assessments.
- Product warranties or defects.
- H • Guarantees of the indebtedness of other parties.
- Charges created to secure the liabilities of other parties.
- Bills of exchange discounted with recourse.

I With regard to the reference to 'legal action', the petitioner denies that he has taken legal action and that such reference to 'legal action' was imaginary and misleading. The respondent however explains this by suggesting that 'legal action' referred to the claims made by the petitioner in his correspondence. The petitioner argues that this explanation is unacceptable

because the respondent had made reference to 'legal action' as opposed to 'claims'. I find that since the respondent had entered this debt under 'contingent liabilities' it makes no difference as to the type of language used. Whether there was legal action actually pending or legal action that has been threatened, which can be reasonably inferred from the correspondence, the issue remains the same, ie the respondent did not unequivocally admit this debt. A B

I therefore hold that it is accepted accounting practice to provide for pending or threatened litigation under the heading 'contingent liabilities'.

GAAP also explains the accounting view with regard to the likelihood of the contingency ever occurring. It says at pp 35–36: C

The accounting treatment of a contingent loss or liability is determined by the expected outcome of the contingency. The range of expected outcomes is often expressed using general descriptions such as:

- Probable (likely to occur).
 - Possible (between probable and remote).
 - Remote (slight chance of occurring).
- D

In the circumstances, when the directors of the respondent had clearly described the possible contingent claim of the petitioner as 'remote' in both the 1993 and 1994 accounts, it was the opinion of the directors that there was the least chance of the petitioner succeeding. In that context, I cannot hold that the respondent had made either a calculated or a perfunctory admission of the disputed debt. In *Perwira Habib Bank Malaysia Bhd v Hj Abdullah bin Hj Sulaiman & Anor* [1985] 2 CLJ 489 at p 492, VC George J (as his Lordship then was) said: E

The question is whether what is stated is an admission of fact and if so whether that admission entitles the applying party to judgment or order. The admission must be implied from all the circumstances but the court must be satisfied that it amounts to an unequivocal admission for it to pronounce judgment by the summary procedure provided by O 27 r 3. F

I therefore hold that there is no clear admission of the disputed debt in question by the directors in this case just because they had made provisions for the same in their statement of account for both the 1993 and 1994 years. G

Is the debt a disputed debt?

The respondent argues that the debt is indeed in dispute. They contend that with reference to the 1991 agreement referred to earlier there was no provision relating specifically to the Sabakina licence. It is common ground that the completion agreement forms the basis of the disputed debt. H

With regard to the claim for RM10m which Ishak had allegedly satisfied, it is clear that there is in existence a disputed debt. The respondent contend that they had fulfilled their obligation under the completion agreement and thus their refusal to entertain any request from the petitioner to issue a further cheque in the petitioner's favour. The petitioner claims that the liability of the respondent to pay the petitioner the RM10m I

A remains undischarged and that therefore the debt remains unpaid. The respondent argues that prior to the filing of this petition, the petitioner had knowledge that the alleged debt of RM10m was at all times in dispute. The contrary submissions of both counsel itself clearly showed a dispute.

B With regard to the claim for RM20m, the respondent contends that by failing to renew the Sabakina licence by 31 December 1993, the petitioner had forfeited the right to the said sum of RM20m.

C On the other hand, the petitioner contends that he had indeed obtained the renewal of the licence by 13 November 1993. However, the relevant portion of the said letter from the Chief Minister's Department to the petitioner reads:

(2) Sila maklum bahawa permohonan tersebut adalah diluluskan tertakluk kepada penentuan keluasan kawasan dan syarat-syarat lain yang akan ditetapkan oleh Pengarah Perhutanan berdasarkan dasar pengurusan perhutanan secara berkekalan dan tertakluk kepada Enakmen Hutan 1968.

D However, the definition of renewal in the completion agreement reads as follows:

E Renewal means a renewal or fresh licence or lease is issued/allowed by the appropriate authorities for a period of at least five years from the date of expiry either directly or indirectly to the purchaser or to Sykt Sabakina Sdn Bhd or their nominees permitting the holder of the licence to immediately extract forest produce in at least the same manner and location and to the same extent as existing in the present licence. Such renewal shall be completed by delivery of the licence on or before 31 October 1992 to the purchaser or its nominee. Renewal shall also mean the right to extract timber as a result of reforestation requirements.

F In the circumstances, it will be seen that renewal means delivery of the renewed licence to the respondent's nominee for a period of at least five years with a right to immediate extraction of forest produce in the same manner, location and extent of the Sabakina licence. In response to the allegation that the respondent delayed in providing the petitioner with various documents, the respondent states that it was well within the knowledge of the petitioner that renewal meant actual delivery of the renewed licence to the respondent.

G In *Mann & Anor v Goldstein & Anor* [1968] 2 All ER 769 Ungood-Thomas J held that the court would restrain a petition where the debt was disputed by the company on some substantial ground. By substantial ground, the learned judge meant that it must not be some ground which was frivolous or without substance. He also held that winding up was not a remedy intended by legislature to enforce payment of a debt and that to pursue a winding-up petition in such circumstances was an abuse of the process of the court.

I This same principle was applied and adopted in *Mark Jaya Engineering Sdn Bhd v LFY Construction Sdn Bhd* [1990] 1 MLJ 372, *Ng Ah Kway v Tai Kit Enterprise Sdn Bhd* [1986] 1 MLJ 58 and *Watta Battery Industries Sdn Bhd v Uni-Batt Manufacturing Sdn Bhd* [1990] 1 CLJ 578.

Mr Narayanan referred to *Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95 and argued that, as held by the Supreme Court, prima facie, an unpaid creditor was entitled to petition for a winding-up order against a company which failed to pay its debt. Mr Narayanan urged me to follow the said decision.

To see if Mr Narayanan's customary persuasiveness could move me, I had to consider *Morgan Guaranty's* case. I find that in that case the principle of disputed debt as submitted by the respondent therein was accepted by the court but it held that on the evidence, there was no such dispute. Hence, *Morgan Guaranty's* case ought not to be used as a yardstick to give a petitioner a blanket guarantee that his petition will be heard in any event. In that case, there was also a supporting creditor. The Supreme Court was never given the benefit of hearing arguments concerning both 'the quick assets test' and the 'overall assets and liabilities test'. In the circumstances, *Morgan Guaranty's* case does not bind me. The Supreme Court in *Morgan Guaranty* referred to *Chip Yew Brick Works Sdn Bhd Chang Heer Enterprise Sdn Bhd* [1988] 2 MLJ 447 in its decision not to strike out the petition before it.

Chip Yew was a case which dealt with a statutory demand under s 218(2)(a). The High Court granted an injunction to the respondent company restraining the appellant from advertising the petition.

On the facts, the company had admitted a part of the debt as due and owing in its affidavit. Therefore, the Supreme Court held that it was caught under s 218(2)(a) as having neglected to pay the debt and was deemed unable to pay its debts. As the amount of the admitted and unpaid debt was substantial and made up almost half of the amount claimed, the Supreme Court held the appellant should not be prevented from pursuing its petition and the injunction was therefore lifted.

The Supreme Court in *Chip Yew* referred to *Re Welsh Brick Industries Ltd* [1946] 2 All ER 197 and adopted the principle in *Welsh Brick* that the court can allow evidence to be adduced to enable it to consider whether or not there was a bona fide dispute. The court can allow evidence to be adduced and evidence has been adduced at interlocutory stage to decide whether there is a bona fide dispute. The question is: 'is there a bona fide dispute?' In the present case, I find that there is a bona fide dispute on the evidence adduced.

In any event, *Welsh Brick's* case involved a winding-up petition which was disputed on only one ground which is, that in the civil suit for the same debt, the court had granted unconditional leave to defend pursuant to O 14. In disputing the winding-up petition, no evidence was led to prove the dispute but for the fact of the unconditional leave to defend. The Court of Appeal held that the mere fact of unconditional leave being granted to defend, although a point to consider, did not automatically mean that there was a bona fide dispute. The lower court should have gone into the evidence to decide whether there was a bona fide dispute. The Court of Appeal then appraised the evidence adduced and held that it was most 'flimsy and of the most vague character' and therefore there was no bona fide dispute.

A In the present case, I am satisfied that there is sufficient evidence
before me to show that the debt is in dispute. This court ought not to be
used as a debt collecting agency nor is it to be used as a stage where the
B machinations of disgruntled corporate directors are play acted with
unbridled vigour. This court will not be used as a tool to propagate
corporate disputes. Where it is clear that a winding-up proceeding is not
the appropriate measure to be taken, it is the duty of the court to send out
a clear signal to corporate figures to desist from enjoining the court into
their fray.

Improper pressure

C The very fact that the petitioner being well aware prior to the presentation
of this petition that the debt was in dispute, filed the petition and continued
with it, was a clear indication of his intention to bring improper pressure
to bear upon the respondent keeping in mind that the respondent is a
D public listed company having both a finance company and an insurance
company as its subsidiaries. I hold that since the winding-up petition is
highly prejudicial to the respondent, it ought to be struck out. The petitioner
ought to proceed to recover his debt in the civil court. However, once he
has judgment in the civil court, he can then come back to this court
pursuant to s 218(2)(a) of the Act in the event the respondent refuses to
E pay the said sum.

Position of law relating to s 218(2)(a), (b) and (c) of the Act

The petitioner vide his written submission conceded that s 218(2) of the
Act dealt with the definition of 'inability to pay debts' and that the
provisions were evidential in nature. I agree with this proposition. The
F juxtaposition of s 218(2)(c) and the words of the subsection 'a company
shall be deemed to be unable to pay its debts' renders untenable any view
other than that the word 'deemed' is used to prescribe avenues of proving
the inability of the company to pay its debts, as opposed to creating a
statutory *ipse dixit*.

G The petitioner further submits that in the case of s 218(2)(a) and (b)
of the Act, the presumption that the company is unable to pay its debts
arises before the filing of the petition and that at the hearing of the
petition, the respondent is obliged to rebut that statutory presumption, the
burden of proof now having shifted to the respondent. However, in the
H case of s 218(2)(c) of the Act, the position that is envisaged is one where
the creditor has not served a statutory notice under s 218(2)(a) nor has he
the benefit of an unsatisfied judgment, decree or order under s 218(2)(b)
of the Act. Therefore, where the creditor chooses to proceed under
s 218(2)(c), the burden is on the creditor to prove, at the trial of the
petition, to the satisfaction of the court that the company is unable to pay
I its debts.

With the above proposition of the law, I am unable to agree. I am of
the view that s 218(2) only provides the methods by which a petitioning
creditor may prove the ground as stated in s 218(1)(e) which is reproduced
herewith.

218 (1) The Court may order the winding up if —

(e) the company is unable to pay its debts;

It is in my view an incorrect submission of the law when the petitioner contends that in cases of s 218(2)(a) and (b) the presumption arises before the filing of the petition and that the position is different under s 218(2)(c). I hold that the presumption under s 218(2) only arises after adjudication by the court and after the facts giving rise to the presumption are proved regardless of the means employed by a petitioner to prove the ground based on s 218(1)(e). The court is empowered to strike out a petition which relies on s 218(1)(e) read with s 218(2)(a) where it can be shown at the interlocutory stage that the petition is bound to fail or is an abuse of the process of the court as the court can hold that there is no necessity for a trial to determine whether the presumption under s 218(2)(a) can be invoked. Clearly, any petition grounded on s 218(1)(e) which is sought to be proved under s 218(2)(a) or (b) or (c) and which is based on a debt which is in dispute, or which is bound to fail or is otherwise an abuse of the process can be struck out at the interlocutory stage.

A petitioner cannot traverse outside the petition

The petitioner has throughout his submission been contending that he requires a hearing to prove that the respondent is unable to pay its debts under s 218(2)(c) of the Act. However, it is common ground that in so far as the petition is concerned (which is the hearing the petitioner is referring to), the evidence relating to insolvency that the petitioner is relying on rests with the statement of accounts for the years ending 1993 and 1994 which show that the current liabilities exceed the current assets for each of the two years. It is also common ground that the petitioner has not pleaded any other ground to prove that the respondent is insolvent. I hold that other than the statement of accounts which the petitioner had adduced, he cannot rely on any other extrinsic fact or ground in support of his petition because the petitioner is bound by his petition and cannot traverse outside it. In *Re Lundie Brothers Ltd* [1965] 2 All ER 692 Plowman J said at p 699 (per curiam):

It seems to me that it would be wrong for the court to travel outside the allegations in the petition, particularly in a case of this sort where the petition is based on the proposition that the respondents to it have been guilty of some oppression or some lack of probity.

In *Ng Tai Tuan & Anor v Chng Gim Huat Pte Ltd* [1991] 1 MLJ 338, Chao Hick Tin JC disallowed a petitioner from straying outside his petition when he said at p 343:

Other than a bare statement in para 8 of the petition which reads 'alternatively the company is insolvent and unable to pay its debts' there is no other statement or allegation in the petition setting out facts to show that the company is generally insolvent. The affidavit filed by the petitioners at the eleventh hour was an attempt to introduce evidence on the company's general insolvency even though nothing on that is stated in the petition

A itself. I agree with the submission of the counsel for the company that it would be grossly unfairly to permit the introduction of such facts by affidavit at that late stage. The company had hardly an adequate opportunity to rebut.

I think the following comments by Meggery J in *Re Fildes Bros Ltd* [1970] 1 All ER 923 at p 923 are most apt:

B ‘In cases in which there are no normal pleadings, it seems to me important that those who oppose a winding-up should know, in time to prepare their case, what are the allegations that they have to meet. If after a petition has been presented the petitioner wishes to broaden his attack, let him first amend his petition.’

C Accordingly, I ruled that for the purposes of the hearing, I would disregard that affidavit which was filed to persuade the court to wind up the company on the ground that it is generally insolvent.

Based on the statements of accounts adduced by the petitioner himself, I am satisfied in applying the overall assets and liabilities test that there are more than sufficient assets in the company to meet the petitioner’s demand.

D Besides, the debt itself is in dispute.

I agree that there ought to be a hearing; but not a hearing by way of a petition. The petitioner ought to file a writ and go for trial. He will still have the right to cross-examine parties. No injustice to the petitioner can be seen to prevail by allowing this application to strike out this petition. In fact, upon obtaining the judgment against the respondent, the petitioner can proceed to wind up the respondent if he is so minded to. I draw to mind the judgment of Peter Gibson J in *Re Ringtower Holdings plc* [1989] 4 BCC 82 at p 84 where he said:

F If the applicants can satisfy the court that the petitioner’s claims are manifestly unsustainable or are an abuse of the process, justice requires that the petition (even one running to 28 pages, as this one does with the proposed amendments) be struck out forthwith.

I therefore allowed the respondent’s application (encl 8) and struck out the petition with costs.

G *Application allowed.*

Reported by Ng Kian Pin

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